No. 93-518

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is filed with the consent of the parties and in support of the respondents, as provided for in the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

The AFL-CIO is a federation of 86 national and international unions with a total membership of approximately 14,000,000 working men and women. The AFL-CIO, its affiliates, and their members have a strong interest in the constitutional standards applicable to local, state, and federal government economic regulation. As a result of this interest, the AFL-CIO has filed briefs *amicus curiae* in a number of this Court's recent cases involving the

proper interpretation of the Takings Clause. *See, e.g., Concrete Pipe & Prods. v. Constr. Laborers Pension Trust,* 113 S. Ct. 2264 (1993); *Yee v. City of Escondido,* 112 S. Ct. 1522 (1992); *Pennell v. City of San Jose,* 485 U.S. 1 (1988).

INTRODUCTION AND SUMMARY OF ARGUMENT

The AFL-CIO generally supports the positions stated in the brief for respondent in this case. Rather than restate the arguments presented in that brief, we submit this brief to address one argument raised by petitioner and numerous of her supporting *amici*. That argument is as follows: Under this Court's decision in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), a government effectuates a taking that must be compensated whenever it conditions the grant of a permit to develop property on the property owner's agreement to dedicate any traditional property interest to public use, unless the government can show that the conditions placed on the property owner do no more than remedy the precise quantum of harms that would be caused by the proposed development. *See, e.g.,* Brief for Petitioner at 22; Brief for the Institute of Justice at 3-4, 6; Brief of the National Association of Realtors, *et al.* at 4, 10-12; Brief of the National Association of Home Builders, *et al.*, at 16-17.

It is our submission in this brief that this argument is based upon an incorrect understanding of this Court's decision in *Nollan*. Our legal analysis begins with an examination of *Nollan*'s rule and the rationale for that rule. *See infra* pp. 6-8. We next show that in this case, unlike *Nollan* itself, application of that rule leads to the conclusion that the conditions here are a legitimate exercise of the police power and not a subterfuge for the uncompenstated taking of property. *See infra* pp. 8-22.

In making this showing, we examine and refute the contention of petitioner and her *amici* that, under *Nollan,* a state must demonstrate that any condition on a development permit that calls for an agreement to dedicate a traditional property interest must be carefully tailored to ensure that the condition does not result in remedying social harms beyond the specific quantum of harms associated with the proposed development.

First, we show that this contention is not supported in the *Nollan* decision. Rather, *Nollan* turns simply on whether a development condition involving a concession of property rights could be justified as an effort to remedy the social harms associated with the development in question. *See infra* pp. 10-13.

Second, we demonstrate that the test proposed by petitioner and her *amici* is in conflict with the logic and rationale of *Nollan*. *Nollan* recognized that it would be "strange" to force the government to deny a development permit outright, when the government could pursue the same legitimate public interests by the alternative means of granting the permit subject to conditions—including conditions that require the property owner to convey a property interest. Yet the practical implications of petitioner's proffered test would force precisely that "strange" result. *See infra* pp. 13-16.

Third, the position of petitioner and her *amici* is in conflict with basic premises of our system of government. That position cannot be reconciled with the well-established validity of premising government actions on reasonable presumptions and general rules, and the equally well-established validity of placing on individuals seeking exceptions to such rules the burden of showing the propriety of such exceptions. *See infra* pp. 16-19.

Finally, we demonstrate that under the *Nollan* test, properly understood, the conditions at issue in this case are clearly valid. The petitioner has not even approximated the showing required to impugne the legitimacy of those conditions. *See infra* pp. 20-22.

ARGUMENT

A. The facts that frame the issue in this case can be briefly summarized.

Engineering and other expert studies commissioned by the City of Tigard, Oregon showed that intensified commercial development of properties abutting Fanno Creek would increase stormwater runoff into the Creek and thereby heighten the risk that the Creek would flood. *See* Master Drainage Plan at, *e.g.*, 4-2 to 4-6, 5-1 to 5-8, 5-13 to 5-14. Informed by these studies, the Tigard City Council adopted Community Development Code provisions that condition approval of any additional "major" commercial development of those properties on the property owners' dedication of land within the 100-year floodplain of the Creek for a greenway to be used by the City for flood control purposes.

Expert studies also documented traffic congestion problems in the City's commercial district (where the petitioner's property and other Fanno Creek properties are located) that would be exacerbated by further commercial development. *See* Comprehensive Plan at, *e.g.*, Vol. I, p. 227-28, 236-48; Respondent's Appendix at, *e.g.*, 7, 31, 34. The City Council, acting on the basis of these studies and other materials, also adopted Community Development Code provisions that condition approval of any additional "major" commercial development of properties abutting Fanno Creek on the property owners' dedication of land suitable for the construction of a bicycle path that would serve to relieve some traffic congestion.

Pursuant to these Code provisions, when the Dolans sought a development permit to nearly double the size of their existing commercial establishment and to replace an existing gravel parking lot with a paved parking lot, the City conditioned the grant of the permit on the Dolans' agreement to dedicate the land required for the greenway and bicycle path.

The City's Community Development Code also provides that property owners may obtain, from the City Planning Commission, variances from conditions on development permits upon a showing, *inter alia*, that the development will not jeopardize the purposes underlying the conditions. *See* Code § 18.134.050. Although the Dolans sought relief from the greenway and bicycle path conditions through this variance process, the Dolans made *no* showing whatsoever in that process that the proposed development would not produce the additional stormwater runoff or would not generate the additional traffic congestion that were the predicates for the conditions placed on their development permit. *See* Appendix to Petition for Certiorari ("Pet. App.") G at 28, 37, 41.

In this procedural posture, the Planning Commission found, based on the nature of the proposed development and the results of the City's earlier studies, that the development "would be expected to increase the amount of storm water runoff from the site to Fanno Creek . . . [thereby] add[ing] to the need to manage the stream channel and floodplain for drainage purposes," *id.* at 37, and "to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets," *id.* at 24. And the Commission found that the greenway and the bicycle path would serve to alleviate the flooding and traffic harms that were expected to result from the proposed development. *Id.* at 24, 37. On those grounds, the Commission denied the Dolans' application for a variance.[1]

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[1] An additional ground for the denial of the variance was the Commission's conclusion that the Dolans would not be unduly burdened by imposition of the permit conditions. On this point, the Commission found that the Dolans would not be harmed by the dedication of land *within* the floodplain for a greenway because that land was virtually unusable due to year-round water flow from Fanno Creek and because the Dolans' building plans did not contemplate any use of that land. Pet. App. G at 39-41. The Commission further found that while the Dolans would have to

These findings of fact—made by the City Planning Commission, adopted by the City Council, upheld by the Oregon Land Use Board of Appeals, and affirmed by the Oregon Court of Appeals and the Oregon Supreme Court—are *not* contested by petitioner. Based on these factual findings, all of the bodies just referenced concluded that the permit conditions imposed on petitioner were directly responsive to the City's interest in flood control and traffic control, and that the variance was properly denied.[2]

B. The issue thus presented in this case is parallel to the issue presented in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987)—*viz.,* under what circumstances does a government's refusal to grant a development permit except on the condition that the property owner dedicate a property interest for public use amount to a taking of private property requiring the payment of just compensation?

1. In *Nollan,* the owners of a parcel of beachfront property sought a permit to build a larger dwelling on their property. The California Coastal Commission granted the permit but only on the condition that the property owners convey to the public an easement across the beach portion of their property. The *Nollan* Court noted at the outset of its analysis that:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase

modify their building plans to accommodate the dedication of land *adjacent to* the floodplain for a bicycle path, the Dolans had failed to show why such a modification could not be accomplished without hardship. *Id.* at 26-28.

[2] Although petitioner asserts in this Court that the City's permit conditions impose burdens on her that are not comparable to burdens imposed on "other similar development in the city," Brief for Petitioner ("Pet. Br.") at 23-24, the record contains no evidence on this point, and the petitioner has presented no Equal Protection Clause challenge to the City's action.

> public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a [physical] taking. [483 U.S. at 831.]

The *Nollan* Court thus defined the issue posed by the case as follows:

> Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome. [*Id.* at 834.]

The *Nollan* Court followed a two-step analysis for answering this question. The first step is to determine whether the government entity in question could lawfully deny the requested permit outright. If the government has the lawful power to deny the permit, the *Nollan* Court reasoned that the power

> must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end [that would justify denial of the permit]. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not. [*Id.* at 836-37.]

Conversely, "[t]he evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. In that event,

> the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. [*Id.*]

Thus, if the answer at the first step is that the government has the power to deny the permit outright, the second step is to determine whether the condition placed on the permit serves the same governmental interest as would have justified denying the permit altogether. The answer to the second question determines whether the condition is a proper exercise of the police power or a taking.

In *Nollan*, the Court assumed without deciding that the Coastal Commission could have denied the requested permit in order to "protect[] the public's ability to see the beach." *Id.* at 835. But the Court found at step two that: "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id.* at 838. Accordingly, the Court concluded that, because there was *no* nexus between the reason that would have justified denying the permit and the condition that the Nollans convey an easement across the beach area on their property, the easement could not be justified as an alternative means to address the problem raised by the Nollans' proposed development and therefore had to be analyzed on its own terms. So analyzed, the California Coastal Commission's requirement that the Nollans convey an easement across the beach to the public was a physical taking that must be compensated.

2. As we now show, application of the *Nollan* two-step analysis leads to the opposite result in the instant case.

a. Under the *Nollan* analysis, the first question here is whether the City could simply have denied the Dolans' request for a permit to nearly double the size of their commercial enterprise and to enlarge and pave their gravel parking lot. The City has asserted two concerns that, we submit, constitute precisely the kind of legitimate regulatory concerns that would justify such an action. The City

has stated—and it is undisputed in the factual record of this case—that intensified commercial development by property owners abutting Fanno Creek would increase the risk of flooding and would exacerbate existing traffic congestion problems in the area of these properties.

Certainly it would be a classic legitimate exercise of the police power for a local government to freeze further commercial development in an area where the government determined that such development could lead to increased risks of flooding or traffic congestion. As this Court stated in *Nollan*, "[w]e have long recognized that land-use regulation does not effect a taking if it 'substantially advanced[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" 483 U.S. at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

Here, as in *Nollan*, there could be no serious claim that a permit denial would have deprived the Dolans of the " 'economically viable use of [their] land.' " *Id.* And here—parallel to what was assumed in *Nollan*—a legislative determination to halt further major development in a particular area in order to avoid flood control and traffic congestion problems is well within what *Nollan* described as the "broad range of governmental purposes and regulations [that] satisfies" the " 'legitimate state interests' " requirement. 483 U.S. at 834-35; *see Agins*, 447 U.S. at 261 & n.8 (upholding local government policy of restricting residential development by setting an extremely low permissible density level in order to avoid such "ill effects of urbanization," as "air, noise and water pollution, traffic congestion, . . . fire and flood, and other demonstrated consequences of urban sprawl") (internal quotations omitted). *See also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) (collecting cases).[3]

[3] Although *Agins* treated the requirement that a development restriction "substantially advance legitimate state interests" as

b. As we have discussed, the second step in the *Nollan* analysis is to determine whether the conditions the City placed on the granting of the Dolans' permit serve the "same legitimate police-power purpose" as would have justified outright denial of the permit request.

(i) The *Nollan* Court states and explains the applicable test in this regard at several points in its opinion. It is useful to begin with an examination of the words used by the Court, because those words reveal both the nature and the logic of the test.

In laying out the test, the *Nollan* Court begins by "agree[ing]" with the argument "that a permit condition that serves the *same* legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." 483 U.S. at 836 (emphasis added). And, in concluding its explication of the test, the Court states: "In short, unless the permit condition serves the *same* governmental purpose as the development ban, the building restriction is not a valid regulation of land use

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part of the proper inquiry under the Takings Clause, the test originates in—and is carried over from—this Court's Due Process Clause jurisprudence. *Agins* invokes *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), in this regard. *See* 447 U.S. at 260. And *Nectow* was a due process case, *not* a takings case.

The majority and the dissent in *Nollan* debate the point whether this test for assessing the legitimacy of state regulation under the police power might be applied in the takings context in a more demanding manner than has been the case in the due process context. *Compare* 483 U.S. at 834 n.3 *with id.* at 843 & n.1. As we demonstrate in text, the result in this case does not turn on the proper resolution of that debate. Nevertheless, it is instructive to note that this Court has recently recognized that where "due process arguments are unavailing, 'it would be surprising indeed to discover the challenged [government action] nonetheless violating the Takings Clause.'" *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 113 S. Ct. 2264, 2289 (1993) (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986)).

but 'an out-and-out plan of extortion.'" *Id.* at 837 (emphasis added).

The key word in those formulations is "same"—*viz.*, the "*same* legitimate police-power purpose" or the "*same* governmental purpose." What is meant by that word is made clear by the passages in the opinion that disclose the logic of the test. Perhaps the fullest statement of that logic is contained in the following passage:

> [The] Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not. [483 U.S. at 836-37.]

Thus, *Nollan*'s premise is that the Takings Clause does not place the government, and the property owner, in a constitutional straight jacket by requiring the government to make an all or nothing choice—either to grant or to deny the permit. Rather, where alternative options, including "a concession of property rights" on the part of the property owner, might better serve the interests of both parties, the Takings Clause does not stand in the way. Where the government's legitimate interest could be served by the less drastic means of granting the permit on the condition of a concession of property rights that serves that same legitimate government interest, "it would be strange to conclude that providing the owner an alternative" to outright denial of the permit is a taking whereas the denial would be a legitimate exercise of the police power.

The *Nollan* Court provided the following hypothetical examples to illustrate this point:

> Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. [*Id.* at 836.]

As these examples show, as long as there is a nexus between the justification for denying a permit and the purpose served by conditioning a permit on the transfer of a property interest—*viz.*, as long as the condition can reasonably be characterized as an effort to serve the same purposes as a legitimate denial—the condition is a legitimate exercise of the police power and not a taking. And the Court's opinion makes clear what is inherent in the logic of the situation—the nexus test does not require that the condition serve the same purpose in the same degree or manner as an outright denial of the development permit. For example, in *Nollan*, providing a "viewing spot on their property" would have served the same interest of preserving sight lines to the shore as outright denial of the permit, but would not have done so in the same degree or in the same manner.

Accordingly, *Nollan* goes no further than to hold that: "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition *utterly fails to further* the end advanced as the justification for the prohibition." *Id.* at 837 (emphasis added). Thus, under *Nollan*, only when the condition "utterly fails to further" the same end is it appropriate to conclude that "[t]he purpose [of the condition] then becomes, quite simply,

the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." *Id.*

(ii) The logic and rationale of this test leave no room for interjecting a proportionality assessment of the type proposed by petitioner and her *amici*. First of all, the *Nollan* test, as we have shown, is predicated on the permissibility of an outright denial of the permit. And the validity of such a denial is *not* tested through any proportionality assessment. Nothing in *Nollan*'s logic provides a basis for injecting petitioner's proportionality analysis into the second stage of the *Nollan* analysis.

Equally to the point, the purpose of the test—to avoid forcing the government to an all or nothing choice, when other alternatives may satisfy the interests of both the government and the property owner—would be frustrated if the condition were subjected to different requirements than would be applicable to the question of outright permit denial. So long as the question asked is whether the condition serves the "*same*" purpose as would justify permit denial, the test is congruent with its rationale. If the condition is lawful only if it meets a more demanding standard not applicable in judging the validity of the permit denial, the test goes beyond its purpose.

Petitioner and her *amici* seek a Takings Clause rule that moves the *Nollan* approach far beyond whether the condition is an effort to address the "same" legitimate state interests as would justify permit denial. They would add the requirement that a condition is lawful if, and only if, the government body can carry the burden, through whatever expert studies or analyses may be necessary, of quantifying precisely the harms that the proposed development will cause, and of demonstrating that the conditions will alleviate no more than that quantum of the same harms.

Such a "proportionality" test would impose costs on any choice by a government entity to regulate land use

through conditions on development, no matter how legitimate the purposes pursued by the government entity. Such costs would include, at least, the following: (a) the transaction costs associated with conducting studies and evaluations of each particular property development, focused on determining the precise quantum of costs the particular development is likely to impose on the community and the quantum of benefits any particular condition is likely to provide; (b) the costs associated with proceeding in the face of uncertainty, without the ability to adopt a "cushion" of protection to account for the possibility of a project's imposing greater burdens on the community than anticipated; (c) the costs associated with having to design special conditions addressed to the burdens imposed by each particular project separately, even though it may be far simpler and less costly to formulate conditions that operate in coordination with an overall plan; and (d) the costs associated with the risk that, under petitioner's standard, any particular condition will be judged insufficiently tailored, so that compensation will be required.

Imposing these costs on governments considering development permit conditions would inevitably push government bodies to one of two unsatisfactory extremes: denying the permit outright or granting the permit outright. In the first instance, denial of the permit would protect the social interests that would be harmed by the development (and would avoid the costs that petitioner's test would otherwise impose). Doing so would, however, frustrate development and its benefits, and eliminate the possibility that the government and the property owner would find a mutually agreeable method of permitting development in a manner that alleviates the associated social harms. In the second instance, the granting of the permit would require the government to accept the public harms caused by the development.

That petitioner's test will often, in practice, prevent a government entity from proceeding through the use of de-

velopment conditions is demonstrated by this case. For example, petitioner and her *amici* assert that the City here should have been required precisely to determine how much added traffic congestion would, over time, be produced by the new development (a difficult or impossible task, given the uncertainties associated with predicting the long-term success of any commercial development, not to mention a development that, once completed, can be changed in use, *e.g.*, by petitioner changing the nature of her business or product). Then, the City should have precisely determined how much congestion the bicycle path would relieve over time, to ensure that it would not relieve more congestion than this particular development would cause. And the City should have to engage in a similar process for each permit application, at substantial cumulative costs.

It is particularly revealing that petitioner and her *amici* —after complaining of the inexactitude of the bicycle path condition as a remedy for the particular congestion that *this* proposed development may cause—at no point offer any suggestion as to what sort of condition might solve the City's legitimate concerns without constituting a taking. This is so, we submit, because the approach they advocate would make the formulation and provision of conditions by governments to solve these sorts of development problems, without the governments' actions being held to be takings, a practical impossibility.

But *Nollan* recognizes that the Takings Clause does not force a Hobson's choice. *Nollan* clearly recognized the value of governments being able to offer property owners legitimate alternatives to outright prohibition of development. For at least the last century, local government bodies throughout the country have used development conditions involving the transfer of real property interests as a principal means for assuring that development occurs in an orderly fashion, consistent with the health, safety and welfare interests of the broader community. *See, e.g.,*

D. Hagman & D. Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* 349-50 (American Society of Planning Officials 1978) ("Cities and counties routinely require subdividers to provide specific public facilities (e.g., water lines, sanitary sewers, paving of streets, construction of sidewalks, curbs, gutters, and drainage facilities) and to dedicate necessary streets and easements."); *see also* Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 Law & Contemp. Prob. 5-7 (1987); Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 Law & Contemp. Prob. 70 (1987); A. Nelson, *Public Provision of Pedestrian and Bicycle Access Ways: Public Policy Rationale and the Nature of Private Benefits* (Center for Planning and Development, Georgia Institute of Technology, Working Paper Series, Jan. 1994). Nothing in *Nollan*'s holding or rationale suggests that this deeply rooted beneficial practice is anything but a proper exercise of the police power.

(iii) Beyond its inconsistency with the rationale of *Nollan*, this "proportionality" argument put forward by petitioner and her *amici* is inconsistent with the basic premises of our system of governance. Here the City, after diligent legislative inquiry, adopted—for reasons we have shown to be legitimate state interests—a system of regulating property development in an area that included the Dolans' property. In enacting that regulation, the City did not undertake a separate inquiry into the effects of development on each parcel of property covered by the regulatory system, but rather relied on its general findings to state a general prohibition and a general exception—in terms of specified conditions—to the prohibition. And there can be no doubt that the general prohibition rests on preventing real social harms, and that the general exception is addressed to alleviating those same harms.

In regulating through general rules, the City was acting in the manner in which we expect legislative bodies to act. It is a basic tenet of our system that legislative bodies may—and ordinarily do—adopt rules of general application without making specific findings as to the impact that the regulations will have on each individual affected by the rules. *See, e.g., Gorieb v. Fox*, 274 U.S. 603, 607 (1927); *see also Penn Central, supra; Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Welch v. Swasey*, 214 U.S. 91 (1909).

And, this Court's cases have accepted this reality of our governance system, which is rooted in our inherent human limitations, in its myriad rulings that government bodies cannot be expected to act with anything like "scientific precision" or "mathematical exactitude." *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 n.16 (1987) ("That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it."); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude."); *Sproles v. Binford*, 286 U.S. 374, 388-89 (1932) ("To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government. . . . When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment."); *Gorieb, supra*, 274 U.S. at 608 ("State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which [local] conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable."); *Hadacheck v. Sebastian*, 239

U.S. 394, 413-14 (1915) ("[W]e have no means of determining, and besides, we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions, or that some other exercise would have been better or less harsh.").

Beyond adopting a general regulation, the City provided a variance process to consider individual circumstances. And it is equally well settled that governments may, as here, accommodate individual circumstances within a system of general regulations, by making available a procedure in which individuals may show that they should be exempted in whole or in part from a general regulation. *See Gorieb, supra,* 274 U.S. at 607. This Court has made clear that—in the context of regulation of the use of real property, as in other contexts—it is appropriate for government to place the burden of production and persuasion on the individual seeking an exemption or variance.

Indeed, this Court in *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962), placed this very burden on a property owner challenging a land-use restriction on due process grounds. *Goldblatt* involved an ordinance, enacted as a safety measure, regulating dredging and pit excavation on properties within the town. The property owner argued that further excavation of his property would not affect public safety. The Court stated:

> Although one could imagine that preventing further deepening of a pond already 25 feet deep would have a *de minimis* effect on public safety, we cannot say that such a conclusion is compelled by facts of which we can take notice. Even if we could draw such a conclusion, we would be unable to say the ordinance is unreasonable; for all we know, the ordinance may have a *de minimis* effect on appellants. Our past cases leave no doubt that appellants had the burden on "reasonableness." *E.g., Bibb v. Navajo Freight Lines,* 359 U.S. 520, 529 (1959) (exercise of police power is presumed to be constitutionally valid); *Salsburg v. Maryland,* 346 U.S. 545, 553 (1954) (the presumption of reasonableness is with the State); *United States v. Carolene Products Co.,* 304 U.S. 144, 154 (1938) (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it.) This burden not having been met, the prohibition of excavation on the 20-acre-lake tract must stand as a valid police regulation. [369 U.S. at 595-96.]

Here, the Dolans invoked the City's variance procedure, but chose to submit no evidence whatsoever on any of the issues they now claim to be determinative. They provided no evidence that their proposed development would not have the harmful effects that were the predicates of the regulatory program adopted by the City. Nor did they show that the conditions placed on the permit were not reasonable means to deal with the harms that the Dolans' proposed development was expected to create. The spectre of "disproportion" that they now raise derives not from evidence but from hypothesis. Thus, for example, petitioner conjectures, without any proof, that the storm-water runoff caused by the proposed development might be no more than a "thimble full" of water. *See* Pet. Br. at 28, 33; *see also e.g.,* Brief of the Institute for Justice at 24-25; Brief of Pacific Legal Foundation, *et al.,* at 16. But, without having submitted any evidence on the subject, petitioner is in no better position to attack the application of the City's regulatory scheme to her property than was the property owner in *Goldblatt.*[4]

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[4] Moreover, petitioner and her *amici* wholly ignore the benefits that will flow peculiarly to petitioner from the bicycle path and the greenway conditions. A completed bicycle path that provides another means of access to the commercial enterprises abutting Fanno Creek will be of obvious commercial value to those enterprises. Indeed, as the City Planning Commission specifically found in this case, "[i]t is reasonable to assume that customers and employees of the future uses of [the Dolans'] site could utilize a pedestrain/bicycle pathway adjacent to this development for their

(iv) On the understanding of the *Nollan* test that we have set forth, there can be no doubt that the conditions here serve the "same" legitimate governmental interests as would have justified a denial of the permit outright. The administrative factual findings here, which are undisputed, demonstrate that the conditions would serve to eliminate or alleviate the two harms that were reasonably found by the City to be associated with the proposed development—an increased risk of flooding and exacerbation of the existing traffic congestion problem. As we have made clear, precisely because those harms would result from the proposed development, it would have been a proper exercise of the police power for the City simply to deny the requested permit in order to avoid those harms. Thus, the conditions are addressed to the same harms as would have justified the denial. Under the terms of *Nollan*, the grant of the permit based on the conditions at issue here is therefore a proper exercise of the police power and not a taking.

In stating this conclusion in these straightforward terms, we are not unaware that *Nollan* expressed a concern that the governmental approach of conditioning a permit grant on the conveyance of a property interest not be used as a subterfuge for taking property without just compensation. The facts of *Nollan* itself show that this concern is not fanciful. And, as we understand it, the very purpose of the *Nollan* test is to separate out those development conditions that are legitimate exercises of the police power and those that are subterfuges for uncompensated takings of property interests.

In this regard, *Nollan* states that an inference of subterfuge is appropriate where the purpose served by the condition is not a purpose that would have justified denial of the permit. The inquiry required for that determination

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transportation and recreational needs." Pet. App. G at 24. Similarly, Creek-side property owners will obviously benefit more than other property owners from the increased flood protection provided by the greenway.

can be conducted on the face of the stated rationale for the government's action. There is no need in that inquiry for courts to second guess the precise balance struck by the government body in its pursuit of its fully legitimate regulatory goals.

At the same time, *Nollan* emphasized the legitimacy of bona fide development conditions. *Nollan* pointed out that it would be "strange to conclude" that governments could not employ the approach of conditional development grants as an alternative to prohibiting development. 483 U.S. at 836. And, as we have discussed, local governments have employed this approach as a principal means of managing development for the better part of this century. *See supra* pp. 15-16. Transactions of this nature are not thus inherently suspect, and there is no reason to look at this class of cases with less than the usual deference accorded by courts to legislative determinations. *See supra* pp. 16-19; *see also e.g. Nebbia v. New York*, 291 U.S. 502, 537-38 (1934); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1926); *Price v. Illinois*, 238 U.S .446, 452-53 (1914); *Powell v. Pennsylvania*, 127 U.S. 678, 683-86 (1887).

Against that background, even if, contrary to what we have shown (*supra* p. 19), petitioner had established a factual basis for the argument that the permit conditions imposed upon her would cause her to bear some burden for alleviating public problems that are caused not by her development but by the actions of others, that argument would not necessarily support an inference of subterfuge. As we have already shown at length, governments in adopting legitimate regulations are not expected or required to, and ordinarily do not, regulate with the kind of precision that assures the close fit between harm and burden for which petitioner and her *amici* argue. And the failure to achieve such a close fit is not normally seen as a basis for questioning the bona fides of the stated purposes underlying the regulation. Moreover, as we have also shown, there are numerous reasons why a government,

solely concerned with remedying the harms associated with a proposed development project, would likely adopt conditions that would fail the test advocated by petitioner and her *amici*. *See supra* pp. 13-15.

For these reasons, a property owner seeking to prove subterfuge must show far more than the mere fact that a development condition would likely operate to remedy more of a given social harm than her proposed development would likely cause. Rather, in order to raise an inference of subterfuge, the property owner would have to show that the development condition is so out of proportion to the legitimate public interests burdened by the proposed development that the condition cannot reasonably be justified as part of an effort to protect those interests.

Given that the petitioner has not even shown, as a fact, that the conditions here would likely remedy more harms than the development project would likely cause, it is plain without more that her Takings Clause challenge to the conditions fails.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Oregon in this case should be affirmed.

Respectfully submitted,

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